No. 07-240

In the Supreme Court of the United States

LAWRENCE R. MCCONNELL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MARLEIGH D. DOVER
LOWELL V. STURGILL JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioners' Federal Tort Claims Act suit, which arose out of an active-duty Air Force member's death that occurred while he participated in a military-sponsored recreation program, is barred by *Feres* v. *United States*, 340 U.S. 135 (1950).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Bon v. *United States*, 802 F.2d 1092 (9th Cir. 1986) .. 4, 13
Bozeman v. *United States*, 780 F.2d 198 (2d Cir. 1985) 13
Brooks v. *United States*, 337 U.S. 49 (1949) 8
Chambers v. *United States*, 357 F.2d 224 (8th Cir. 1966) 10, 13
Costo v. *United States*, 248 F.3d 863 (9th Cir. 2001), cert. denied, 534 U.S. 1078 (2002) 3, 4
Dreier v. *United States*, 106 F.3d 844 (9th Cir. 1966) ... 14
Feres v. *United States*, 340 U.S. 135 (1950) ..... *passim*
Hass v. *United States*, 518 F.2d 1138 (4th Cir. 1975) 10, 13
Jones v. *United States*, 112 F.3d 299 (7th Cir.), cert. denied, 522 U.S. 865 (1997) 13
Kelly v. *Panama Canal Comm'n*, 26 F.3d 597 (5th Cir. 1994) 14
Lauer v. *United States*, 968 F.2d 1428 (1st Cir.), cert. denied, 506 U.S. 1033 (1992) 13
Miller v. *United States*, 643 F.2d 481 (8th Cir. 1980) 9

Cases–Continued: Page

Potts v. *United States*, 723 F.2d 20 (6th Cir.), cert. denied, 466 U.S. 959 (1984) 13
Pringle v. *United States*, 208 F.3d 1220 (10th Cir. 2000) 10, 13
Rayner v. *United States*, 760 F.2d 1217 (11th Cir.), cert. denied, 474 U.S. 851 (1985) 13
Schoenfeld v. *Quamme*, 492 F.3d 1016 (9th Cir. 2007) ... 14
Stencel Aero Eng'g Corp. v. *United States*, 431 U.S. 666 (1977) 6, 9, 16
United States v. *Brown*, 348 U.S. 110 (1954) 6
United States v. *Johnson*, 481 U.S. 681 (1987) 6. 7, 9, 10, 15, 16
United States v. *Shearer*, 473 U.S. 52 (1985) 6, 7, 9, 11, 16
United States v. *Stanley*, 483 U.S. 669 (1987) 15
Wake v. *United States*, 89 F.3d 53 (2d Cir. 1996) 10
Walls v. *United States*, 832 F.2d 93 (7th Cir. 1987) 13
Whitley v. *United States*, 170 F.3d 1061 (11th Cir. 1999) 14
Woodside v. *United States*, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980) 10, 13
Zoula v. *United States*, 217 F.2d 81 (5th Cir. 1955) 8, 9

Statutes:

Federal Torts Claims Act:
28 U.S.C. 1346(b)(1) 3
28 U.S.C. 2679 3
10 U.S.C. 1074a (2000 & Supp. V 2005) 16

Statutes—Continued: Page

10 U.S.C. 1475-1477 16
10 U.S.C. 1478 (2000 & Supp. V 2005) 16
10 U.S.C. 1482 (2000 & Supp. V 2005) 16

Miscellaneous:

Department of the Air Force, *Air Force Instruction 34-262, Service Programs and Use Eligibility* (Apr. 27, 2000) 2, 17

In the Supreme Court of the United States

No. 07-240

LAWRENCE R. MCCONNELL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-14a) is reported at 478 F.3d 1092. The opinion of the district court (Pet. App. 15a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was filed on March 8, 2007. A petition for rehearing was denied on May 29, 2007 (Pet. App. 1a). The petition for a writ of certiorari was filed on August 20, 2007. The jurisdiction of this Court is invoked under by 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a boating accident on Lake Pleasant, Arizona, on May 19, 2001. At that time, Lieutenants Joseph James McConnell, Steven Frodsham, Mark Donohue, and Matthew Crowell were F-16 student

pilots in the United States Air Force, assigned to Luke Air Force Base (Luke AFB) in Arizona. The day before the accident, Lt. Crowell rented a boat owned by the Air Force from the Luke AFB Recreation Center (Recreation Center), which is located on Luke AFB. Lt. Crowell rented the boat on behalf of his colleagues who were busy in a meeting. Lts. McConnell, Frodsham, and Donohue were subsequently briefed on the rules and regulations governing use of the boat, and were required to follow them. Pet. App. 3a.

The boat was rented pursuant to an agreement with the Recreation Center, which the Luke AFB Recreation Program operates. The Recreation Center makes equipment rentals available to active-duty military personnel and their families; civilian guests may use the equipment only if accompanied and supervised by military personnel. The Recreation Program is a command function, one of various "Morale, Recreation, and Welfare" programs administered by the 56th Services Squadron, Mission Support Group, and Fighter Wing Commanders. Pet. App. 4a-5a. Such programs support the Air Force mission by "contributing to readiness and improving productivity" through "promoting fitness, espirit-decorps, and quality-of-life" for active-duty military personnel, their family members, and civilian guests. *Id.* at 4a & n.1 (quoting Department of the Air Force, *Air Force Instruction 34-262, Services Programs and Use Eligibility* para. 1.1 (Apr. 27, 2000) (*Air Force Instruction 34-262*)).

On the morning of the accident, Lts. McConnell, Frodsham, and Donohue transported the boat to Lake Pleasant using Lt. McConnell's truck. Lt. Crowell planned to join the group later that day. At approximately 10:30 a.m., Lt. McConnell fell while waterskiing

behind the boat, and Lt. Frodsham circled the boat around to bring the ski rope to Lt. McConnell. As the boat neared Lt. McConnell, it surged forward and fatally struck him. A police investigation later determined that the boat's throttle cable had broken, preventing Lt. Frodsham from slowing the boat except by turning off the ignition. Pet. App. 3a-4a.

2. Lt. McConnell's parents subsequently filed this suit against the United States for wrongful death and loss of consortium under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), 2679. They alleged that the Air Force failed to maintain, service, and repair the boat properly or to warn users that the boat was defective and unreasonably dangerous. Pet. App. 5a.

The district court dismissed the complaint, Pet. App. 15a-37a, pursuant to *Feres* v. *United States*, 340 U.S. 135 (1950), which bars FTCA suits by members of the armed services for injuries that "arise out of or are in the course of activity incident to service." Pet. App. 21a-22a (quoting *Feres*, 340 U.S. at 146).

3. The court of appeals affirmed. Pet. App. 2a-14a. It first noted the rationales underlying the *Feres* doctrine that this Court has identified. *Id.* at 6a-7a. The court of appeals then described four factors the Ninth Circuit considers in making a case-by-case determination of whether an armed forces member's injury occurred in the course of activities "incident to service." *Id.* at 7a-8a. Those factors are "(1) the place where the negligence occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of the plaintiff's status as a service member, and (4) the nature of the plaintiff's activity at the time the negligent act occurred." *Ibid.* (quoting *Costo* v. *United States*, 248 F.3d 863, 867 (9th

Cir. 2001), cert. denied, 534 U.S. 1078 (2002)). The court of appeals emphasized that "none of these factors are dispositive," and that "[r]ather than seizing on any particular combination of factors, we have focused on the totality of the circumstances." *Id.* at 8a (internal quotations omitted) (quoting *Costo*, 248 F.3d at 867).

Applying these principles, the court of appeals concluded that petitioners' suit was controlled by a line of Ninth Circuit cases holding that *Feres* precludes FTCA suits related to injuries to active-duty service members who are injured while participating in military recreational programs. See Pet. App. 8a-13a (citing, *e.g.*, *Costo*, 248 F.3d at 864-865, 867-868 (military rafting trip), and *Bon* v. *United States*, 802 F.2d 1092 (9th Cir. 1986) (boat rental)).

In reaching that conclusion, the court of appeals noted that the allegedly negligent service and repair of the boat occurred on base; that Lt. McConnell was on active duty, though free for the day, at the time of the accident; that he was subject to military orders and discipline while using the boat; that his use of the boat was a benefit of his position as an armed forces member; and that his activities, while recreational, were nonetheless "military-sponsored." Pet. App. 9a-12a. Under these circumstances, the court concluded, Lt. McConnell's injury occurred in the course of activities incident to service. *Ibid.*

The court of appeals also found this conclusion to be supported by *Feres*'s rationale of protecting military decision making. Pet. App. 12a-13a. Petitioners' suit could require discovery of "the command structure and regulations for inspecting and maintaining motorboats on the military base." *Id.* at 13a. Likewise, "[b]ecause Lt. McConnell and his colleagues were briefed on the

Air Force's installation rules and regulations governing the use of the boat and were required to follow them," the court of appeals reasoned that "allowing the suit to proceed would inherently require discovery of, and evaluation of, whether they were properly conveyed to Lt. McConnell and his colleagues, and whether they, as military officers, properly complied with the instructions." *Ibid.* Similarly, "[b]ecause the government claims that Lt. McConnell's recreational use of the motorboat was related to his overall military mission, allowing the suit to go forward might well require a civilian court to evaluate whether the recreational use was so related and whether the recreational program met some standard of care." *Ibid.* For a court to engage in such review, the court of appeals noted, would constitute precisely the sort of unwarranted judicial intrusion on military decisionmaking that *Feres* is designed to prevent. *Ibid.*

Judge Gould concurred, noting that the court's opinion "accurately reflects our prior circuit precedent." Pet. App. 14a. He expressed reservations about that precedent, however, because, in his view, suits arising out of military-sponsored recreational programs do not undermine military discipline. *Ibid.*

ARGUMENT

1. The court of appeals' decision properly applies this Court's decisions to particular facts and does not warrant further review.

a. In *Feres* v. *United States*, 340 U.S. 135 (1950), the Court held that service members cannot bring tort suits against the government for injuries that "arise out of or are in the course of activity incident to service." *Id.* at 146. The *Feres* Court considered three separate cases involving suits by active-duty service members. *Id.* at

136-137. Two suits arose out of injuries the service members suffered while undergoing medical operations performed by military surgeons. *Id.* at 137. The other suit related to a service member's death by fire as he was sleeping in his barracks. *Id.* at 136-137; *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 670 (1977) (describing *Feres* as involving an active-duty service member who was killed while sleeping). The Court characterized each of these suits as presenting claims for injuries sustained "incident to the service," *Feres*, 340 U.S. at 138, and concluded that Congress could not have intended to permit such cases to proceed under the FTCA. *Id.* at 146.

In subsequent cases, this Court has consistently reaffirmed the *Feres* doctrine and applied it to "bar all suits on behalf of service members against the Government based on service-related injuries." *United States* v. *Johnson*, 481 U.S. 681, 687-688 (1987); *e.g.*, *Stencel Aero Eng'g Corp.*, 431 U.S. at 671; *United States* v. *Brown*, 348 U.S. 110, 112 (1954). The Court has emphasized that *Feres*' "incident to service" test requires a case-by-case assessment of the totality of the circumstances. See, *e.g.*, *United States* v. *Shearer*, 473 U.S. 52, 57 (1985) ("The *Feres* doctrine cannot be reduced to a few bright-line rules."). In addition, the Court has identified three rationales that undergird the *Feres* doctrine. First, the "distinctively federal" nature of the relationship between the United States and its service members requires that the United States' liability and a service member's compensation be uniform and not vary by the state in which a member is injured. *Johnson*, 481 U.S. at 689 (quoting *Feres*, 340 U.S. at 143). Second, Congress' provision of "generous statutory disability and death benefits" serves as an ample alternative to tort

recovery. *Id.* at 689-690. Finally, the *Feres* doctrine prohibits service-related suits "because they are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Id.* at 690 (quoting *Shearer*, 473 U.S. at 59).

In light of these principles, the court of appeals correctly concluded that *Feres* precludes petitioners' suit. Like the service members injured in *Feres*, Lt. McConnell was on active duty at the time of the accident. Also like the service members in *Feres*, only due to his membership in the armed services was Lt. McConnell engaged in the activity that gave rise to his injury. He and his colleagues had access to the Recreation Center's boat by virtue of their military status, and their boating activity was one of the Air Force's morale, welfare, and recreation programs designed to promote the Air Force's mission. See Pet. App. 4a-5a. The Air Force's rules and regulations govern the Luke AFB Outdoor Recreation Program and Lt. McConnell's use of the boat. See *id.* at 4a. Lt. McConnell's use of the Air Force's recreational services at the time of his death was therefore akin to the service members' use of military medical services in *Feres*.

In addition, as the court of appeals explained (Pet. App. 12a-13a), allowing this case to proceed would require the courts to second-guess military judgments regarding the maintenance of equipment and the operation of military programs. The *Feres* doctrine prevents such review. *Shearer*, 473 U.S. at 57; see *Johnson*, 481 U.S. at 691 ("[A] suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.")

b. Petitioners contend (Pet. 6-9) the *Feres* doctrine permits their suit to proceed because it resembles the suit at issue in this Court's decision in *Brooks* v. *United States*, 337 U.S. 49 (1949). That contention is mistaken. In *Brooks*, this Court permitted a service member and the estate of another to bring an FTCA suit after a military vehicle struck the private car in which the servicemen rode on a public highway while they were on furlough. *Id.* at 50-51; *Feres*, 340 U.S. at 146 (noting that servicemen in *Brooks* were injured while on furlough). The Court reasoned that the accident was not incident to the plaintiff's service because it "had nothing to do with [the service members'] army careers, * * * except in the sense that all human events depend upon what has already transpired." *Brooks*, 337 U.S. at 52.

Here, unlike in *Brooks*, Lt. McConnell's status as a member of the military related to the accident and was not a mere coincidence. Lt. McConnell's accident occurred while he engaged in recreational activity that the Air Force made available to him pursuant to its morale, recreation, and welfare program for airmen on active duty. While the military status of the servicemen in *Brooks* had no relation to their driving of their own car while on furlough, Lt. McConnell and his colleagues were eligible to borrow the Recreation Center's boat only by virtue of their active-duty military status. Under this Court's cases, nothing more is necessary to make the *Feres* doctrine applicable.

Contrary to petitioners' characterizations (Pet. 8), the fact that Lt. McConnell was off duty for the day of the boat accident does not bring this case under *Brooks*' control. Being off duty or on "pass" differs from being on furlough or leave in the military. See *Zoula* v. *United States*, 217 F.2d 81, 83 n.1 (5th Cir. 1955).

Whereas furlough or leave is a right earned and to which the service member is entitled; a pass is simply a privilege that may or may not be accorded him. *Ibid.* Thus, a service member on furlough or leave is not subject to be called upon to engage in military duty, unless formal steps are taken to cancel his furlough or leave status. *Ibid.* In contrast, a service member who is merely off duty may be called back to service at any point without any formal steps having been taken. *Ibid.*; see *Miller* v. *United States*, 643 F.2d 481, 483 n.5 (8th Cir. 1980) ("The term 'active duty status' encompasses more than just the time during on-duty hours. It includes off-duty hours, and time spent on liberty or pass."). *Feres* emphasized this distinction between furlough and active duty in explaining why the servicemen on furlough in *Brooks* were permitted to bring suit. 340 U.S. at 138, 146. Although the *Feres* doctrine may permit a suit by a service member who is injured while on furlough, it bars suits for service-related injuries suffered while off duty during a period of active duty. *Johnson*, 481 U.S. at 687 n.8 (citing approvingly lower courts' application of the *Feres* doctrine to bar suits by service members who were injured while off duty); *Shearer*, 473 U.S. at 53-54 (service member was off duty when murdered by fellow service member); *Stencel Aero Eng'g Corp.*, 431 U.S. at 670 (noting that *Feres* involved an active-duty serviceman killed while off duty and sleeping). Thus, the fact that Lt. McConnell had the day off when the accident occurred does not remove this suit from *Feres*' reach.

Petitioners' contention (Pet. 8) that the *Feres* doctrine applies only to injuries sustained while a service member performs a military mission under orders is similarly flawed. In *Johnson*, this Court approvingly

cited court of appeals decisions that applied the *Feres* doctrine to cases involving service members injured while engaging in voluntary, off-duty military recreation. See *Johnson*, 481 U.S. at 687 n.8 (citing *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979), and *Hass* v. *United States*, 518 F.2d 1138 (4th Cir. 1975)), cert. denied, 455 U.S. 904 (1980). Accordingly, lower courts have regularly applied *Feres* to bar claims arising out of myriad circumstances involving service members' voluntary activities, such as travel on military vehicles, *e.g.*, *Wake* v. *United States*, 89 F.3d 53, 59-60 (2d Cir. 1996), enjoyment of military-sponsored social clubs, *e.g.*, *Pringle* v. *United States*, 208 F.3d 1220, 1226-1227 (10th Cir. 2000), and swimming in military pools, *Chambers* v. *United States*, 357 F.2d 224, 229-230 (8th Cir. 1966). Those cases demonstrate that the operation of an effective military entails not only combat and related training but also the provision of housing, medical care, and other services, as well as programs to engender high troop morale. Service members' participation in these various aspects of military life are all incident to their service, and the *Feres* doctrine restrains courts from second-guessing military judgments over how the military operates them. Because the court of appeals' properly concluded that petitioners' may not bring suit for the decedent's service-related injury, further review is unwarranted.

2. Petitioners argue (Pet. 9-12) that the court of appeals erred by substituting a four-factor test for the *Feres* inquiry into whether the decedent's injury occurred incident to his service. That argument is incorrect.

The court of appeals did not displace the *Feres* inquiry with its four factors. Instead, it properly acknowl-

edged that the overriding question was whether the decedent's injuries occurred "in the course of activity incident to service," Pet. App. 6a (quoting *Feres*, 340 U.S. at 146), and considered the factors as a means of answering that question. See *id.* at 7a. Nor did the court of appeals rely unduly on its four factors. The court stressed that the *Feres* inquiry must take into account the totality of the circumstances and that it must align its result with the factual scenarios analyzed in precedents. *Id.* at 8a. Thus, petitioners overstate the significance of the four factors to the court of appeals' ultimate decision.

In addition, the court of appeals' four factors are consistent with the *Feres* doctrine. Far from being irrelevant, as petitioners contend (Pet. 11), the situs of negligence may help determine whether an accident was service-related. Negligence occurring on a military base or near a military operation, for example, is more likely to be service-related because the military has a compelling interest in controlling what happens there. Moreover, in this case, the fact that the alleged negligence occurred at the military-run Recreation Center raises the concern that this suit would inappropriately require a court to sit in review of the military's programs. See *Shearer*, 473 U.S. at 57-58.

The "duty status" factor finds relevance in *Feres*' emphasis on the active-duty status of the service members in question, in contrast to the service members in *Brooks* who were injured while on furlough. 340 U.S. at 138, 146. Similarly, *Feres* itself illustrates the relevance of analyzing whether a service member's injury related to his receipt of military benefits or services that were conditioned on his active-duty status. *Id.* at 137-138. As noted above, two suits reviewed in *Feres* involved medical malpractice claims against the military, and the third

involved a claim on behalf of a soldier who died in a barracks fire. See *id.* at 136-137. In each of the cases, an injured service member had received military benefits or services (i.e., medical treatment or housing) to which he was entitled because of his active-duty status. Finally, the "nature of plaintiff's activity" factor is a straightforward inquiry into what the service member was doing at the time of the accident and helps determine whether the accident is service-related.

Petitioner nevertheless contends (Pet. 11) that the Ninth Circuit's "duty status" and "nature of activity" factors are misguided because they focus on the service member's duty status and activities at the time of the alleged negligence, rather than the time of the accident. Petitioner misreads the court of appeals' decision. In this case, the court of appeals sensibly adapted the Ninth Circuit's test and considered Lt. McConnell's active-duty status and activities at the time of his accident. See Pet. App. 10a-12a. Thus, contrary to petitioners' assertion (Pet. 8), the court of appeals considered all facts relevant to whether Lt. McConnell's accident occurred incident to his service.

3. Petitioners contend (Pet. 21-24) that the courts of appeals disagree on how to apply the *Feres* doctrine in cases involving recreational injuries occurring while a service member is off duty, and suggest that Lt. McConnell would have prevailed under other courts of appeals' standards. Petitioners' contentions are mistaken.

Although the courts of appeals employ slightly varying formulations of factors to consider in the *Feres* inquiry, they agree on its substance. Particularly, all courts of appeals agree that *Feres* disallows suits brought after a service member suffers an injury while

receiving a military benefit or service to which he is entitled because of his military status, even if he is off duty at the time of injury. See, *e.g.*, *Pringle*, 208 F.3d at 1226-1227 (claim by soldier who gang members beat after he was ejected from military social club available to military personnel); *Jones* v. *United States*, 112 F.3d 299, 301-302 (7th Cir.) (medical malpractice claim arising from injury suffered while service member was training for the Olympics), cert. denied 522 U.S. 865 (1997); *Lauer* v. *United States*, 968 F.2d 1428 (1st Cir.) (claim by off-duty service member injured while walking on military-maintained road to off-post bar), cert. denied, 506 U.S. 1033 (1992); *Walls* v. *United States*, 832 F.2d 93, 95-96 (7th Cir. 1987) (claim by service member injured in airplane crash during recreational flying); *Bon* v. *United States*, 802 F.2d 1092, 1095-1096 (9th Cir. 1986) (claim related to service member's injury while paddling canoe rented from military recreation center); *Bozeman* v. *United States*, 780 F.2d 198, 201 (2d Cir. 1985) (claim related to serviceman's death in accident after he was drinking off duty at club available to military personnel); *Rayner* v. *United States*, 760 F.2d 1217, 1219 (11th Cir.) (medical malpractice claim arising out of elective surgery made available because of military status), cert. denied, 474 U.S. 851 (1985); *Potts* v. *United States*, 723 F.2d 20, 20-21 (6th Cir. 1983) (per curiam) (claim related to sailor's injury while returning in naval landing craft from shore leave), cert. denied, 466 U.S. 959 (1984); *Woodside*, 606 F.2d at 141 (claim related to military civil engineer's death while flying plane from base's recreational club); *Hass*, 518 F.2d at 1142-1143 (suit by serviceman against civilian manager of military-owned horse stable); *Chambers*, 357 F.2d at 226-227 (service member drowned in on-base swimming pool

while off duty). Thus, rather than divergence, there is striking uniformity among the courts of appeals regarding application of the *Feres* doctrine in this kind of case.

It is therefore unsurprising that petitioners fail to identify any particularized conflict among the lower courts involving the application of *Feres*'s concededly contextual rule to cases involving circumstances similar to those presented here. The one case petitioners offer (Pet. 24 & n.55) as an example of a conflicting decision, *Kelly* v. *Panama Canal Comm'n*, 26 F.3d 597 (5th Cir. 1994), is readily distinguishable from this case and those cited above. In *Kelly*, the wife of an Army officer alleged that the Panama Canal Commission negligently maintained electrical wires that struck the mast of a catamaran that her husband was sailing while off duty on a weekend, resulting in his death. *Id.* at 599. The court of appeals held that *Feres* was inapplicable because the catamaran was privately-owned, because it was available for rent to anyone and not solely to military personnel, and because no military regulations governed the rental agreement or his sailing activity. See *id.* at 600-601 & n.1.

Under those facts, the Ninth Circuit, as well as other circuits, also would have found the *Feres* doctrine inapplicable. See, *e.g.*, *Schoenfeld* v. *Quamme*, 492 F.3d 1016 (9th Cir. 2007) (*Feres* permits suit by service member injured, while off duty and engaged in personal errands, in traffic accident on military road opened for general public's use); *Whitley* v. *United States*, 170 F.3d 1061 (11th Cir. 1999) (*Feres* inapplicable to suit by foreign service member injured in traffic accident while engaged in voluntary rugby trip that was not sponsored for military purposes); *Dreier* v. *United States*, 106 F.3d 844 (9th Cir. 1996) (*Feres* permits suit by service mem-

ber injured while swimming in military recreation area accessible to the gener[illegible]ublic). In contrast to the service member in *Kelly*, Lt. McConnell's death occurred while he participated in a military recreation program to which he had access because of his active duty status, and which was governed by special military regulations.

In sum, there is no need for this Court to provide guidance to the lower courts regarding the *Feres* doctrine in this kind of case.

4. Petitioners argue (Pet. 14-21) that *Feres* should not bar their suit because applying *Feres* here would not promote the rationales that support the doctrine. This Court, however, has expressly declined to condition *Feres*' applicability on the extent to which a given case implicates its rationales. See *Johnson*, 481 U.S. at 686-688.

In *Johnson*, the Court rejected the Eleventh Circuit's freestanding inquiry into whether allowing a suit would impair military discipline, 481 U.S. at 684-685, and reaffirmed that *Feres* applies to any suit arising out of activities incident to service. *Id.* at 687-688. As this Court has explained, "[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters. * * * The 'incident to service' test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military mattters." *United States* v. *Stanley*, 483 U.S. 669, 682-683 (1987). For the same reasons, the fact that Lt. McConnell was injured in an activity incident to service requires application of the *Feres* bar here.

In any event, the *Feres* doctrine's three rationales are, in fact, implicated in this case. First, the "distinc-

tively federal" relationship between "the government and members of its armed forces" requires that the happenstance of where a service-related injury occurs should not determine the government's liability to service members. *Johnson*, 481 U.S. at 689 (quoting *Feres*, 340 U.S. at 143). "Instead, application of the underlying federal remedy that provides 'simple, certain, and uniform compensation for injuries or death of those in armed services' is appropriate." *Ibid.* (citation omitted). Because Lt. McConnell was injured incident to his military service, the fortuity of where he was injured should not determine whether Arizona law governs the United States' liability for his death. *Id.* at 689.

Second, the *Feres* doctrine recognizes that "[t]hose injured during the course of activity incident to service not only receive benefits that 'compare extremely favorably with those provided by most workmen's compensation statutes,' but the recovery of benefits is 'swift and efficient,' 'normally requir[ing] no litigation.'" *Johnson*, 481 U.S. at 690 (quoting *Feres*, 340 U.S. at 145, and *Stencil Aero Eng'g Corp.*, 431 U.S. at 673). Indeed, for active-duty service members whose death occurs incident to service, Congress has provided, among other benefits, free medical treatment while the member remained alive, 10 U.S.C. 1074a (2000 & Supp. V 2005); a death gratuity, 10 U.S.C. 1475-1477; 10 U.S.C. 1478 (2000 & Supp. V. 2005); and payment of his funeral expenses, 10 U.S.C. 1482 (2000 & Supp. V 2005).

Finally, petitioners' suit "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Johnson*, 481 U.S. at 690 (quoting *Shearer*, 473 U.S. at 59). Petitioners' claim (Pet. 15-20) that this suit does not implicate military discipline is based on an overly narrow view of the scope

of the military's affairs. The morale, welfare, and recreation programs, which include the Luke AFB Recreation Program, "are vital to [the Air Force's] mission accomplishment" and support that mission by "contributing to readiness and improving productivity through * * * promoting fitness, espirit-de-corps, and quality-of-life" for service members and their families. Pet. App. 4a-5a n.1 (quoting *Air Force Instruction 34-262* paras. 1.1 to 1.2). Thus, the military's recreational offerings are integral to its training and retention of an effective fighting force. Decisions about how to operate those programs are military judgments. As the court of appeals observed (Pet. App. 13a), petitioners' suit could require judicial inquiry into the Air Force's regulations for inspecting and maintaining recreational equipment, the adequacy of the Air Force's instructions to users of the equipment, and whether the recreational activities promoted the Air Force's overall mission effectively. Accordingly, the *Feres* doctrine's third rationale is promoted by dismissal of petitioners' suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARLEIGH D. DOVER
LOWELL V. STURGILL JR.
Attorneys

OCTOBER 2007